

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7062

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

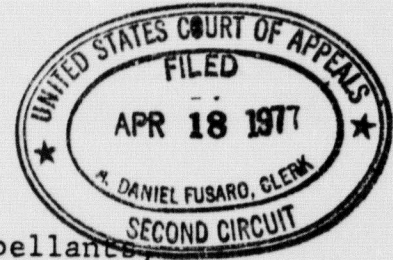
ROBERT E. McDONNELL and
ROBERT DeMARTINO,

Plaintiffs-Appellants,

-against-

SOUTHERN VERMONT LAND COMPANY, INC.,
HARRY S. PATTEN, MORTON FREEDMAN,
and PHILIP GRANDE,

Defendants-Appellees.



BPLS

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES,
SOUTHERN VERMONT LAND COMPANY, INC.
AND HARRY S. PATTEN

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UNITED STATES COURT OF APPEALS
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ROBERT E. McDONNELL and
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Plaintiffs-Appellants,

-against-

SOUTHERN VERMONT LAND COMPANY, INC.,
HARRY S. PATTEN, MORTON FREEDMAN,
and PHILIP GRANDE,

Defendants-Appellees.

Docket No. 77-7062

BRIEF OF DEFENDANTS-APPELLEES,
SOUTHERN VERMONT LAND COMPANY, INC.
AND HARRY S. PATTEN

STATEMENT OF FACTS

The Defendants in this case are Philip J. Grande, a Massachusetts resident who is a real estate broker with his principal office in Williamstown, Massachusetts; Southern Vermont Land Co., Inc., a Vermont corporation; Harry S. Patten, a Vermont resident, who is named as the seller; and Morton Freedman, a Massachusetts resident, who is named as Attorney for Plaintiffs.

In early July, 1973, Plaintiffs Robert E. McDonnell ("McDonnell") and Robert DeMartino ("DeMartino") came to Grande's office in Williamstown, Massachusetts at the recommendation of an acquaintance in New York, and stated that they wished to purchase land. (Set forth in the Appendix at page A-31*).

Judge Mishler in his Memorandum of Decision and Order made

*References herein captioned "A" refer to Appendix,
followed by page number.

the following findings of fact, based on an evidentiary hearing held on December 3, 1976:-

"Plaintiffs indicated a desire to purchase developable lands in the western portion of the state. Grande showed them two listed parcels located in Hancock, Massachusetts, which were owned by defendant Patten as trustee under a declaration of trust. After both a walking tour and aerial survey, the parties returned to Grande's office where he advised plaintiffs that an application for subdivision of the parcels had been filed and was being contested in the courts. The proposed subdivision plan was produced and inspected by plaintiffs.

"Plaintiffs immediately expressed their willingness to purchase the property, and Grande promptly drew up a purchase agreement in longhand. He procured plaintiffs' signatures while they remained in Massachusetts and arranged to obtain the signature of seller Patten."

The Plaintiffs agreed to purchase two abutting parcels of land with a residence thereon in Hancock, Berkshire County, Massachusetts, for the sum of \$160,000.

After signing the purchase agreement, Plaintiffs inquired of Grande if he knew a local attorney who could represent them at the closing. Grande suggested Defendant Freedman, who maintained offices in North Adams, Massachusetts. Plaintiffs retained his services and requested he arrange for the necessary title search. (A-125).

Shortly thereafter, when advised that the title search had been completed, Grande called Plaintiffs in New York and asked them to come to Massachusetts for the closing. Plaintiffs advised him that they could not get away. To accommodate them, Grande flew

into LaGuardia Airport with Freedman where they met with Plaintiffs in order to go over details of the transaction. At the airport, Plaintiffs reviewed the details of title, signed an agreement assuming the existing mortgage, and delivered to Freedman a check for the balance of the purchase price. Freedman and Grande immediately flew back to Massachusetts where counsel recorded the deed the next day and tendered payment to Patten's attorney. (A-125-126).

The meeting at the airport in New York lasted approximately 45 minutes. (A-56). During this brief meeting, financial information was reviewed, a mortgage assumption agreement was signed by Plaintiffs, a so-called "wraparound" mortgage in favor of Patten, Trustee, was signed (A-110), and a check for the balance of the purchase price was delivered by Plaintiffs to their own attorney. Final payment was not tendered to the Seller (Patten, Trustee) until Plaintiff's attorney, Freedman, returned to Massachusetts and gave the check to Patten's attorney. (A-130).

To conclude, Plaintiffs traveled to Massachusetts and negotiated the purchase; they engaged the services of a Massachusetts broker; they agreed to purchase lands situated in Massachusetts; and they executed the contract of sale while they were in Massachusetts. It was contemplated that final performance would be in Massachusetts. It was only to accommodate Plaintiffs' busy schedule that Grande and Freedman traveled to New York. (A-129).

These Defendants contend that the above-described activities by them were not such as to subject them to the jurisdiction of the

New York Courts and the United States District Court for the Eastern District of New York. A Motion to Dismiss was timely filed, and the action was dismissed on January 4, 1977. This Appeal followed.

"It cannot be said that defendants, in traveling to New York on a single occasion, purposefully availed themselves of the benefits and protections of New York laws. Grande's physical presence within the state, whether it be to clarify the terms of sale or to finally perform the previously signed purchase agreement does not per se establish purposeful activity...". (A-128-129).

LAW

I. THE DISTRICT COURT DOES NOT HAVE IN PERSONAM JURISDICTION OVER THE DEFENDANTS BY VIRTUE OF N.Y.C.P.L.R. § 302 (a) (1).

A. History of the Doctrine of Minimum Contracts.

In the famous case of Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877), it was established that the due process clause of the Fourteenth Amendment is violated where a court renders a personal judgment against a non-resident individual defendant without having jurisdiction over him, and that, as a matter of due process, it cannot acquire such jurisdiction merely by serving process upon him outside the forum or by publication. Since then the concept of state jurisdiction over nonresidents has been greatly expanded.

The trend toward broadening a state's jurisdiction over non-residents was substantially advanced in 1945 in the leading case of International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154 (1945), which held that a foreign corporation which systematically and continuously employed a force of salesmen within the state could, consistently with due process, be sued in that state. In lieu of the prior tests a new test was laid down to the effect that the due process clause requires only that in order to subject a defendant to a judgment in personam, "certain minimum contacts" within the territory of the forum must be shown so that the maintenance of the suit "does not offend traditional notions of fair play and substantial justice". By rejecting the former theories and adopting the "fair play and substantial justice" test, the Supreme Court opened the

door to the abandonment of the former arbitrary rule that the corporation must be doing a fixed amount of a certain type of activity in order to be "doing business" within the jurisdiction. No generally applicable standards can be ascertained from the decision as to the circumstances under which a foreign resident will be deemed to have sufficient contacts with the forum so that it can be subjected to suit. The material factor is the quality and the nature of the activity, rather than mere quantity. The Supreme Court left open the issue of whether jurisdiction is permissible on the basis of a single transaction within the jurisdiction.

In Hanson v. Denekla, 357 U.S. 235, 78 S. Ct. 1228 (1958), the Supreme Court stated that the unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state and that the application of the "minimal contact" rule will vary with the quality and nature of the defendant's activity. The court went on to say that it is essential in each case "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws".

Finally, it may be observed that, as stated in a number of cases, the evidence of sufficient contact within a state to avoid violation of due process by substituted service on non-residents

depends upon the particular facts of each case. Consolidated Laboratories Inc. v. Shandon Scientific Co. (C.A.7.) 384 Fed. 797 (1967); Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).

In addition, it has been said that the broadened concept of in personam jurisdiction over non-resident defendants and foreign corporations, in cases falling within the scope of "single-act" statutes, does not readily lend itself to the promulgation of an infallible formula automatically determinative of every case and that the facts of each case must be considered in order to arrive at a proper conclusion. Tyee Constr. Co. v. Dulien Steel Products Inc., 62 Wash. 2d 106, 381 P. 2d 245 (1963); Gavenda Bros. Inc. v. Elkins Limestone Co., 145 W. Va. 732, 116 S.E. 2d 910 (1960).

B. The Defendants did not Transact Business in New York Within the Meaning of C.P.L.R. 302 (a) (1).

Based on the New York C.P.L.R. Rules 301 and 302 which state the jurisdictional requirements for bringing an action within the New York courts, we maintain that this court does not have jurisdiction over this cause of action.

Whether the type of activity performed within this state is sufficient to constitute the "transaction of business" necessarily depends on the multitude of facts present in the individual case; there is no hard, fast, mechanical test that can be employed to qualify the answer. Franklin National Bank v. Krakow, 295 F. Supp. 910, 918 (D.D.C. 1969); Schroeder v. Loomis, 46 Misc. 2d

184, 186, 250 N.Y.S. 2d 42, 46 (Sup. Ct. 1965); Aurea Jewelry Creations, Inc. v. Lissona, 344 F. Supp. 179, 181 (S.D.N.Y. 1972). Most critical is the presence of "purposeful activity" or a finding that the defendant has voluntarily invoked the protection of New York laws, Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y. 2d 443, 447, 261 N.Y.S. 2d 8, 18 (1965); Arcata Graphics Corp. v. Murrays Jewelers & Distributors, Inc., 384 F. Supp. 469, 472 (W.D.N.Y. 1974); Leasco Data Processing Equipment Corp. v. Maxwell, 319 F. Supp. 1256, 1261 (S.D.N.Y. 1970), aff'd in part, rev'd in part, remanded in part, 468 F. 2d 1326 (2d Cir. 1972). A mere accidental or fortuitous transaction is not sufficient to confer a jurisdictional basis, Kaye Martin v. Brooks, 267 F. 2d 394, 397 (7th Cir.), cert. denied, 361 U.S. 832, 80 S. Ct. 84 (1959), McLaughlin Practice Commentaries, 7B CPLR §302 at 72-73 (McKinney, 1972).

Thus the central issue is, what acts are sufficient to constitute doing business within a jurisdiction.

Traditionally, for a foreign corporation to come within this section, a corporation must have been doing business in New York with a fair measure of permanence and continuity. Furnam v. General Dynamics Corp. (DCNY) 377 F. Supp 37 (1974). Where a Massachusetts corporation's only place of business was in Massachusetts, and it did not transact business in New York, it never owned any New York realty, and had no subsidiaries, affiliates, or

agents which regularly transacted business in New York, it was not subject to the jurisdiction of the New York courts. Amins v. Life Support Medical Equipment Corp. (D.C.N.Y.) 373 F. Supp. 654 (1974).

In deciding whether a defendant has "transacted business" within the meaning of this section a court will consider purposeful acts of the defendant. State by Lefkowitz v. Colorado State Christian College 76 Misc. 2d 50, 346 NYS 2d 482 (1972). There may be personal jurisdiction under this section over one who has never actually set foot in the state, but the critical question is whether such person engaged in purposeful activity within the state. Pellman v. Martin 70 Misc. 2d 169, 332 NYS 2d 360, (1972).

In Golgay v. Bulletin Co. (2d Cir) 504 F 2d 1062, (1964) a defense motion for dismissal of the complaint on the grounds that the court lacked in personam jurisdiction over the defendant was granted by the District Court of New York, and the plaintiff appealed. The Court of Appeals affirmed. The defendant was a Pennsylvania corporation which published newspapers in Philadelphia. The plaintiff was a manufacturer of machinery with its factory located in New York. In 1966 the parties entered into negotiations by telephone and in personal meetings (all conducted in Philadelphia) for the sale and purchase of machinery. The

negotiations culminated in a proposal signed and accepted in Philadelphia. Thereafter the defendant forwarded an unsigned formal contract to plaintiff who executed the document in Philadelphia and returned it to New York where it was signed by defendant. Defendant claimed the machinery was defective and refused to pay the balance of the cost. Plaintiff then brought diversity action to recover damages for breach of contract. Plaintiff brought action pursuant to N.Y.C.P.L.R. § 302(a)(i). The appeals court, in sustaining defendant's motion to dismiss, stated the following at

"The appellant also relies on the fact that the contract was executed in New York. The court below, assuming for the purposes of the motion that the contract was in fact executed in New York, did not consider this factor determinative. We agree. As far as purposeful activity is concerned, it is much more meaningful that Hoe's representatives came to Philadelphia to negotiate the contract on numerous occasions. *Liquid Carriers Corp. v. American Marine Corp.*, 375 F. 2d 951, 955-956 (2d Cir. 1967). The fact that the formal contract was sent unsigned to Philadelphia, so that the last signature was affixed in New York, is a purely fortuitous circumstance. Technically, in conflicts cases this would make New York the place of contract execution. (But even in a conflicts case, the mere fact that the contract was executed in New York would not be enough per se to make New York law controlling. See *Auten v. Auten*, 308 N.Y. 155, 124 N.E. 2d 99 (1954)). However, if we are to determine if this constitutes a purposeful business activity in New York, it must be noted that here the execution in New York was performed by Hoe and not Bulletin; therefore, it cannot be said that the defendant transacted business in New York. *Green & White Construction Co. v. Columbus Asphalt Corp.*, 293 F. Supp. 279, 280 (S.D.N.Y. 1968); *Standard Wine & Liquor Co. v. Bombay Spirits Co.*, 20 N.Y. 2d 13, 17, 281 N.Y.S. 2d 299, 301, 228 N.E. 2d 367, 369 (1967):"

In *Chetok v. Ethyl Corporation of Canada* (S.D.N.Y.)

341 F. Supp. 1251, (1972), plaintiff instituted suit in

New York for breach of an alleged finders fee contract. Defendant moved, pursuant to F.R. Civ. P. 12(b)(2), to dismiss the complaint for lack of in personam jurisdiction. Ethyl was never licensed or otherwise qualified to do business in New York. It owned no real or personal property situated in New York, nor did it have an office, agent, or other representative for the purpose of transacting business within the state. Ethyl did not manufacture, sell, solicit, ship or advertise in New York, nor did it maintain any telephone listings there. All of Ethyl's income resulted from activities which were carried on solely in Canada. Plaintiff, Chetok, solicited Ethyl. The District Court (Ethyl removed the action to that court pursuant to 28 USC §1441) sustained a motion to dismiss, stating that the defendant (Ethyl) did not purposely avail itself of the privilege of conducting activities in New York, where the original contract between defendant and plaintiff was precipitated by the plaintiff, most of the telephone conversations involving the parties were initiated by the plaintiff, and it was at plaintiff's direction that the oral agreement was reduced to writing and sent to New York. Further, the court emphasized the fact that defendant's trip to New York was at plaintiff's behest and for plaintiff's convenience and the duration of the trip was only one business day. Upon those facts the court dismissed plaintiff's complaint for lack of jurisdiction.

The case of Potter's Photographic Applications Co. v. Ealing Corp. (D.C.N.Y.) 292 F. Supp. 92 (1968) presented a situation where the contract negotiations were held in New York and the agreement signed in Massachusetts (a situation in reverse of the one at bar). The court in holding that New York had jurisdiction stated at page 101:-

"Defendant claims the negotiations in New York are irrelevant since they were not successful, and the contract was concluded by negotiations in Cambridge, Massachusetts. While that (Massachusetts) may be where the seed ripened into fruit, there can be no doubt that it was cultivated in New York."

As was stated earlier, in the present case the Plaintiffs traveled to Massachusetts and negotiated the purchase of the property; they engaged the services of a Massachusetts broker; they agreed to purchase lands situated in Massachusetts; and they executed the contract of sale while they were in Massachusetts. All negotiations were held in Massachusetts. It was contemplated that final performance would be in Massachusetts, and it was only to accommodate Plaintiffs' busy schedule that Grande and Freedman traveled to New York.

According to the cases cited above, and numerous other cases, it cannot be said that Grande and Freedman, in travelling to New York on a single occasion purposefully availed themselves of the benefits and protections of New York laws. Grande's physical presence within the state, whether it be to clarify the terms of sale or to finally perform the previously signed purchase agreement does not per se establish "purposeful activity"; it

is but one factor that must be considered. Franklin National Bank v. Krakow, supra at 918; Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., supra; Aurea Jewelry Creations, Inc. v. Lissona, supra at 181; Standard Wine & Liquor Co. Inc. v. Bombay Spirits Co., 20 N.Y. 2d 13, 17, 281 N.Y.S. 2d 299, 301 (1967). In such cases, the number and duration of visits to this state are critical, McLaughlin Practice Commentaries, supra at 75. See also Liquidated Carriers Corp. v. American Marine Corp., 375 F. 2d 951 (2d Cir. 1967).

II. THE DISTRICT COURT DOES NOT HAVE JURISDICTION
OVER THE DEFENDANTS BY VIRTUE OF N.Y.C.P.L.R.
302 (a) (3).

The previous cases dealt with the court's interpretation of the phrase "transacting business" for the purposes of jurisdiction of the parties. Section 302 (a) (3) deals with tortious acts. The cases construing C. P. L. R. 302 (a) (3) stand for the following:-

(i) This section does not require any connection between defendants' regular activities and the particular tortious act or the cause of action arising from it. Under this subparagraph two elements must combine to provide a basis for jurisdiction. In the first place the defendant must be engaged in substantial, commercial activities within New York, consisting of his regularly doing business or soliciting business, or his engaging in any other persistent conduct, or his deriving substantial revenues from dispensing goods or services within New York. Secondly, the injury caused by the tortious act must occur in New York. The standard to be used in this subparagraph is the "transacting of business", similar to §302 (a) (1).

(ii) This section rests jurisdiction on a finding that the defendant expects or should reasonably expect forum consequences to result from the commission of a tortious act without the state, if, in addition, defendant derives substantial revenue from interstate or international

commerce and the injury occurs in New York. Both conditions - foreseeability and revenue - must be met before jurisdiction can be sustained. There need be no connection between the tortious act and the deriving of substantial revenue from interstate or international commerce. Gonzales v. Harris Calorific Co. 64 Misc. 2d 287, 315 N.Y.S. 2d 51 (1970).

In determining whether defendant derives substantial revenue from interstate or international commerce, the courts should bear in mind that the revenue condition is intended to exclude non-domiciliaries whose business operations are of a local character. (Report of the Judicial Conference to the 1966 Legislature in Relation of the Civil Practice Law and Rules pg. 21, 1966). Thus unaffected by this provision are cases in which a defendant committed a tortious act without the state, had no business contacts with New York, and was not substantially engaged in interstate or international commerce. A non-resident may still escape jurisdiction under C.P.L.R. 302 even though he causes harm to citizens of New York.

In action for fraud and breach of warranty arising out of purchase by plaintiff of a mare at an auction sale in New York, a Kentucky veterinarian who allegedly falsely certified as to the nature of the pregnant condition of a mare was not subject to personal jurisdiction under statute, where examination of the horse and certificate were made in Kentucky for a prior owner, who delivered it to the auctioneer in New

York, even though the certificate was delivered with knowledge that it would be used in New York auction sale and with the intention of inducing purchasers to bid for the horse at prices beyond its value. Where less than 1% of gross income was received by the veterinarian for services rendered outside Kentucky, there was no jurisdiction under statute providing for jurisdiction against one who commits tortious act without state, causing injury to person or property within state, if he expects or should reasonably expect act to have consequences in state and derive substantial revenue from interstate or international commerce. Gluck v. Fasig Tipton Co. 63 Misc. 2d 82, 310 N.Y.S. 2d 809 (1968).

Further, in Lehigh Valley Industries Co. v. Birenbaum (D.C.N.Y.) 389 F. Supp. 789, aff'd 527 F. 2d 87 (1975), the court held that non-residents could not be subject to in personam jurisdiction for having committed tortious acts within the state and no tort was committed within the forum, where false representations were made by non-residents outside forum which induced complainant to rely on and be damaged by those representations within the forum.

In the case at bar the Defendants do not meet the jurisdictional test of this section for several reasons. The most important is that these Defendants neither regularly engage, nor solicit business, nor derive substantial revenues from any activities in New York. Further, these Defendants do not derive substantial revenue from interstate or international commerce.

In relation to the merits of Plaintiffs' claim, based on the above cases Defendants' conduct would not substantiate their being subject to New York jurisdiction.

III. THE DISTRICT COURT DOES NOT HAVE JURIS-
DICTION OVER THE DEFENDANTS BY VIRTUE OF
N.Y.C.P.L.R. 302 (a) (2).

Plaintiffs alternatively contend that C.P.L.R. §302 (a) (2) provides a proper jurisdictional basis, arguing that Grande's fraudulent representations during the LaGuardia meeting induced them into paying the full purchase price. While it is true that "(w)here a defendant knowingly sends into a state a false statement, intending that it should be relied upon to the injury of a resident of the state, he has, for jurisdictional purposes, acted within that state", Polish v. Threshold Technology, Inc., 72 Misc. 2d 610, 612, 340 N.Y.S. 2d 354, 356 (Sup. Ct. 1972), quoting Murphy v. Erwin-Wasey, 460 F. 2d 661, 664 (1st Cir. 1972), this is not such a case. Whatever fraudulent statements may have been made concerning the total amount of raw acreage were initially uttered when the parties entered into the contract; the basis for computing the total purchase price was established in Massachusetts. Any reliance by Plaintiffs on those representations would have occurred, likewise, in Massachusetts. The repetition of those statements in New York cannot be said to have induced Plaintiffs to purchase the property. The tort, if any, would have been committed in Massachusetts. Clearly, this would not meet the requirement of C.P.L.R. §302 (a) (2) that the tortious act be committed within the state. Lehigh Valley Industries Inc. v. Birenbaum, 380 F. Supp. 789, 808 (S.D.N.Y.), aff'd, 527 F. 2d 87 (2d Cir. 1975).

CONCLUSION

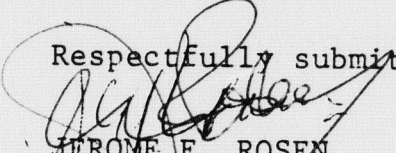
Based on the cases previously cited, we maintain that this court does not have jurisdiction over these parties. Plaintiffs came to Massachusetts in July of 1973 and solicited the services of the Defendant Grande, a real estate broker. The Defendant Grande showed Plaintiffs a piece of property which they later agreed to purchase. All negotiations for the sale of the land were transacted in Massachusetts. The title search for the property was done by Defendant Freedman, a Massachusetts lawyer. Plaintiffs were supposed to go to Massachusetts to close the transaction, but they stated that they were "too busy to go to Massachusetts". At Plaintiffs' behest the Defendants Grande and Freedman flew to LaGuardia Airport where they were met by the Plaintiffs. The only activities at the airport, apart from oral conversations, consisted of the Plaintiffs reading documents prepared by or for their attorney, signing certain documents agreeing to pay the mortgage they were assuming, and delivering those documents and a check to their attorney. Grande and Freedman then promptly returned to Massachusetts. All papers and documents were subsequently recorded and/or delivered in Massachusetts. All Defendants are from Massachusetts or Vermont. These Defendants, Southern Vermont Land Company, Inc. and Harry S. Patten were never themselves in New York in connection with this transaction.

Further, there is no allegation that any of the Defendants solicited any business in New York; that they had any offices,

telephone listings, real or personal property within the state of New York; that they received any revenues whatsoever from any transactions in New York; or that their business was other than purely local to Massachusetts.

On these facts we maintain the Defendants do not have the requisite minimum contacts with New York to afford New York jurisdiction over this action, and submit that the decision of the District Court should be upheld.

Respectfully submitted,


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COUNSELLORS AT LAW INCORPORATED

4-18-77

April 15, 1977

United States Court of Appeals
Second Circuit
U. S. Courthouse
Foley Square
New York, N. Y. 10007

Re: Robert E. McDonnell, et al
v. Southern Vermont Land Company, Inc.
Docket No. 77-7062

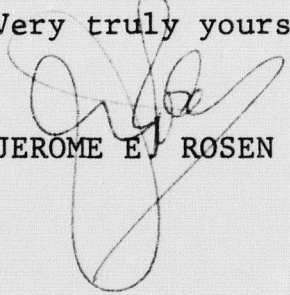
Gentlemen:

I enclose herewith 10 copies of Brief of Defendants-Appellees, Southern Vermont Land Company, Inc. and Harry S. Patten.

I hereby certify that I have mailed copies of the same to:-

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Very truly yours,


JEROME E. ROSEN

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enc.

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